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No. 84-269

In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD J. BLOOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because certain Jencks Act material was redacted by the trial court.

2. Whether petitioner's waiver of a jury trial was voluntary.

3. Whether petitioner's prosecution of his appeal was prejudiced by his inability to obtain access to classified portions of the record on appeal in the case of a co-defendant who was separately tried.

4. Whether the district court properly relied on an affidavit in making a preliminary determination of the admissibility of an item of evidence pursuant to the Classified Information Procedures Act, 18 U.S.C. App. III.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is noted at 732 F.2d 939 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 19, 1984. A petition for rehearing was denied on May 21, 1984 (Pet. App. B). On July 5, 1984, Justice White extended the time for filing a petition for a writ of certiorari to and including August 19, 1984 (a Sunday), and the petition was filed on August 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to export falsely labeled and hazardous explosives, in violation of 18 U.S.C. 371; on one count of falsifying shipping documents submitted to Customs officials, in violation of 18 U.S.C. 1001; on one count of unauthorized shipment of munitions, in violation of 22 U.S.C. 2778(c); and on one count of air transport of hazardous cargo, in violation of 49 U.S.C. (1976 ed.) 1809(b).[1] Petitioner was given a suspended sentence of four concurrent two-year terms of imprisonment and placed on probation for five years (Pet. App. A2-A3). The court of appeals affirmed without opinion (*id.* at A1).

The facts pertinent to petitioner's conviction may be briefly summarized as follows. In 1977, Jerome S. Brower, a dealer in explosives, met with Edwin P. Wilson and certain Libyan nationals in Washington, D.C. Wilson expressed interest in obtaining explosives for shipment to Libya. Brower agreed to obtain 42,300 pounds of plastic explosives for Wilson, with payment to be made through Brower's Swiss bank account. 4 R. 25-30. Petitioner, who was Brower's attorney, travelled to Switzerland to pick up the money to pay for the explosives, and then he hand carried the payments to each of the three manufacturers from whom Brower had arranged to obtain the explosives (4 R. 35-36; 5 R. 66-67, 115). Petitioner also arranged for a chartered flight to transport the ex-

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[1] Petitioner was charged along with co-defendants Edwin P. Wilson and Donald R. Thresher. Wilson was tried separately and convicted. See *United States* v. *Wilson*, 732 F.2d 404 (5th Cir. 1984), cert. pending, No. 84-5411. Thresher entered a guilty plea.

plosives to Libya, but he did not disclose to the charter's agent that the cargo would be explosives (5 R. 71-76, 81). The explosives, falsely labeled as drilling mud, were loaded onto the aircraft in Houston (4 R. 44, 58). Petitioner then rode with the cargo to Lisbon, Portugal, where Brower joined the flight, which continued on to Libya (3 R. 84; 4 R. 52-53). Brower paid petitioner $10,000 for his efforts in connection with the shipment of explosives (4 R. 41-42).

Petitioner's defense rested on his assertion that the explosives shipment had been undertaken on orders of the National Security Council (3 R. 43-44). Petitioner claimed that he had been so advised by Brower, who gave him a silver medallion and stated that it was a National Security Council identification piece (4 R. 43-44). Brower denied making any such statement, however, and instead testified that it was much later, possibly in 1982, when petitioner asked him for the medallion (4 R. 60-64, 96-98, 117).

ARGUMENT

1. Petitioner contends (Pet. 23-33) that the redaction of certain Jencks Act material by the district court deprived him of access to prior grand jury testimony that would have aided his defense. This claim does not warrant further review.

The Jencks Act, 18 U.S.C. 3500, requires the disclosure of any prior statement by a government witness regarding the subject matter of his direct testimony at trial. Material in government files that is arguably not discoverable may be submitted to the district court for an in camera determination of the extent of the government's discovery obligation. 18 U.S.C. 3500(c). Petitioner complains that he was denied "superb material * * * for cross-examin[a-

tion]" (Pet. 28) by the district court's in camera redaction of portions of the grand jury testimony of three witnesses. However, two of those witnesses, Douglas Smith and Peggy Brower, were not called as government witnesses; instead, they were called by petitioner as defense witnesses. Accordingly, the government was under no Jencks Act obligation to turn over their grand jury testimony. 18 U.S.C. 3500(b); see, *e.g.*, *United States* v. *Natale*, 526 F.2d 1160, 1170 n.14 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976).[2]

The third witness, Jerome Brower, had testified before a grand jury regarding the explosives shipment to Libya and also testified about the same subject at trial. Petitioner was provided with the portions of Brower's grand jury testimony that pertained to the explosives shipment. Petitioner was not given those parts of Brower's grand jury testimony that related to Brower's and Wilson's training of Libyans in the construction of terrorist devices, such as exploding briefcases and letter bombs. There was no Jencks Act violation in the district court's redaction of this testimony because Brower did not testify about this subject at trial. The Act entitles petitioner only to those statements of a government witness that "relate[] to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)).

Nor was there any *Brady* violation in the redaction of Brower's grand jury testimony. Petitioner

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[2] Nor did the government have any obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to provide petitioner with the grand jury testimony of Smith and Peggy Brower. Their grand jury testimony was in no way exculpatory, nor has petitioner demonstrated how the allegedly suppressed evidence would have been helpful. *United States* v. *Agurs*, 427 U.S. 97 (1976).

does not contend that the redacted testimony was in any way directly exculpatory; he merely argues (Pet. 28) that he would have used it on cross-examination to impeach Brower's credibility. To be entitled to this testimony, however, petitioner must show that the suppressed evidence would have created "a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, 427 U.S. 97, 109-112 (1976); see also *United States* v. *Mesa*, 660 F.2d 1070, 1076 (5th Cir. 1981) (defendant must show that undisclosed impeachment evidence probably would have resulted in an acquittal). The impeachment evidence cited by petitioner clearly fails to satisfy the materiality standard of *Agurs*. Brower's involvement in making terrorist devices in no way contradicted his testimony regarding the 1977 explosives shipment in which petitioner was involved. Moreover, we note that petitioner should have been—and very likely was—aware of the very information that had been redacted from the transcript of Brower's grand jury testimony. Prior to petitioner's trial, Brower had testified at co-defendant Wilson's trial regarding his and Wilson's involvement in the construction of terrorist devices.[3] It is therefore clear that there was no *Brady* violation because petitioner was independently aware of the redacted information. See *United States* v. *LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983); *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980).

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[3] See our brief in opposition in *Wilson* v. *United States*, No. 84-5411, at 12-13. We are providing petitioner with a copy of our brief in opposition in *Wilson*.

We are advised that petitioner in fact attended Wilson's trial, which preceded his.

2. Petitioner next contends (Pet. 34-46) that he was prejudiced by the failure to disclose Brower's grand jury testimony regarding the construction of terrorist devices because, had he been aware of that evidence, he would not have waived his right to a jury trial. This claim likewise does not warrant further review.

Petitioner cites two contradictory rationales for his post hoc assessment that he would have been better served by a jury trial than a bench trial. First, he asserts that the trial judge, being aware of the terrorist device testimony as a result of his in camera inspection of the grand jury transcripts, would have harbored "a feeling of utmost disgust and loathing" against Brower and his associates, including petitioner (Pet. 40). Petitioner therefore claims that he would have rejected a bench trial because of the likely bias that the trial judge would have felt toward him (Pet. 42).[4] As his second reason for claiming that he would have preferred a jury trial, petitioner claims that Brower's terrorist device testimony before the grand jury could have been used to impeach Brower's credibility at a jury trial (Pet. 37-38). Thus, while complaining that he should not have been tried by a judge who was aware of the terrorist device testimony, petitioner simultaneously avows that he would have placed the same information before a jury if it had been the trier of fact.

Even putting aside the contradictory nature of petitioner's contentions, his claim lacks merit. First, the impeachment value of the terrorist device evi-

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[4] Since petitioner was Brower's attorney (see Pet. 6-7), there is no reason to believe that a jury would have been any less inclined than the district court to associate petitioner with Brower.

dence simply does not rise to the level of materiality necessary to warrant reversal. *United States* v. *Agurs*, 427 U.S. at 109-112; *United States* v. *Mesa*, 660 F.2d at 1076. Second, as noted above, the terrorist device evidence had been part of Brower's testimony before the same district judge at the earlier trial of Wilson, petitioner's co-defendant. Consequently, petitioner cannot now claim that he was unaware of this information when he either knew of it at the time of trial or could have discovered it with minimal diligence. See, *e.g.*, *United States* v. *Conforte*, 624 F.2d 869, 879 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); *United States* v. *Cervantes*, 542 F.2d 773, 779 (9th Cir. 1976). In these circumstances, there is no basis for finding that petitioner's waiver of a jury trial was anything but voluntary. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237-238 (1973).[6]

3. Petitioner also argues (Pet. 46-53) that he was prejudiced in the prosecution of his appeal by the denial of his motion for access to sealed portions

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[6] We also note that the district judge's awareness of the terrorist device evidence did not amount to impermissible personal bias arising from extra-judicial sources that would have required the trial judge to recuse himself. See, *e.g.*, *United States* v. *Kelley*, 712 F.2d 884, 889-890 (1st Cir. 1983); *United States* v. *Porter*, 701 F.2d 1158, 1166 (6th Cir. 1983), cert. denied, No. 83-4 (Dec. 5, 1983); *United States* v. *Baskes*, 687 F.2d 165, 171 (7th Cir. 1981). Moreover, petitioner has failed to make any showing that the trial judge demonstrated any actual bias against him in the course of the proceedings. See, *e.g.*, *United States* v. *Hines*, 696 F.2d 722, 729 (10th Cir. 1982); *United States* v. *Miranne*, 688 F.2d 980, 985 (5th Cir. 1982), cert. denied, 459 U.S. 1109 (1983). Indeed, the probationary sentence imposed by the district judge (Pet. App. A2-A3) would indicate that no such bias existed.

of the record on appeal in the case of his severed co-defendant, Edwin Wilson. The decision below is correct, however, and clearly does not warrant further review.

Petitioner sought at trial to establish a good faith defense similar to that proffered by Wilson at his earlier trial. In that case, Wilson failed to provide sufficient evidence to warrant a jury instruction on a good faith defense, and the trial judge declined to give such an instruction. Much of Wilson's appeal centered on his "CIA defense" and the district court's refusal to give the good faith instruction Wilson had requested. *United States* v. *Wilson*, 732 F.2d 404 (5th Cir. 1984), cert. pending, No. 84-5411. In his own appeal, petitioner sought access to classified information contained in the record on appeal in *Wilson*. Petitioner argues that if he had had access to these materials, relating to Wilson's "CIA defense," he would have been better able to argue in his own appeal that he believed in good faith that the explosives shipment had been authorized by the National Security Council.

We note at the outset that petitioner's good faith defense was resolved against him at trial. Petitioner claimed to have been told by Brower that the National Security Council had authorized the explosives shipment. Brower denied petitioner's allegation, and the district court resolved the credibility dispute against petitioner. That determination presents no issue warranting further review.

Nor is there any basis for petitioner's claim of a right of access to sealed portions of the record on appeal in *Wilson*. Petitioner might have sought access to such material for presentation at his own trial, but he did not. And, of course, his appeal was confined to the record of the proceedings against him in the

district court. Fed. R. App. P. 10(a). It was not open to petitioner to attempt to relitigate his trial by lodging new evidentiary material with the court of appeals. See, *e.g.*, *United States* v. *Anderson*, 481 F.2d 685, 702 n.19 (4th Cir. 1973), aff'd, 417 U.S. 211 (1974).

4. Finally, petitioner contends (Pet. 54-64) that the district court improperly relied on an affidavit to discredit petitioner's good faith defense. The short answer to this claim is that the district court used the affidavit only in determining whether an exhibit petitioner sought to introduce at trial was classified by any national security agency. The court thereafter allowed petitioner to present his good-faith defense, and the government did not use the affidavit to counter petitioner's defense.

Pursuant to the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, petitioner was required to give pretrial notice of his intent to disclose classified information at trial. Petitioner therefore provided the district court with the medallion that Brower allegedly had given him as a "National Security identification piece" (Pet. App. C2). Brower purportedly had received the coin from Wilson and had told petitioner that if he were stopped by BATF or Customs officials, he should display the medallion and they would "go away" (*id.* at C1). The district court submitted the medallion to a Department of Justice Security Officer to determine whether it was in fact a classified item subject to the procedures governing the introduction of classified information mandated by CIPA.

The Security Officer, D. Jerry Rubino, submitted an affidavit in response to the district court's request (Pet. App. G). Rubino stated that he had contacted the two agencies mentioned by petitioner, BATF and

Customs, as well as the Secret Service and the CIA. Based on the information provided by these agencies, Rubino reported to the court that the coin was not a classified national security item and that, in all likelihood, the coin had been minted by a now-defunct company in Utah (*id.* at G3). The effect of the Rubino affidavit, therefore, was to permit petitioner to present his "good faith" defense at trial freed of the procedural restrictions imposed by CIPA.

Petitioner nevertheless complains (Pet. 58) that the Rubino affidavit did not meet the requirements of Fed. R. Evid. 803(10) for the admission of an affidavit attesting to the lack of an entry in a particular set of public records. Petitioner's argument misses the point. The government never offered the Rubino affidavit as evidence at trial. Instead, it was submitted solely for the purpose of assisting the district court in making a preliminary determination with respect to the applicability of CIPA's procedures for handling classified information. The district court is not bound by the rules of evidence in making such preliminary rulings, and reliance on hearsay is entirely appropriate. Fed. R. Evid. 104(a); *United States* v. *Matlock*, 415 U.S. 164, 175 (1974); *United States* v. *Whitten*, 706 F.2d 1000, 1019 (9th Cir. 1983), cert. denied, No. 83-864 (Mar. 19, 1984); *United States* v. *Merritt*, 695 F.2d 1263, 1269-1271 (10th Cir. 1982), cert. denied, 461 U.S. 916 (1983); *United States* v. *Killebrew*, 594 F.2d 1103, 1105 (6th Cir.), cert. denied, 442 U.S. 933 (1979).

Although the government did not offer the Rubino affidavit as evidence at trial, petitioner did (4 R. 101, Def. Exh. 28). Thus, the most that can be said to have occurred is that the district court permitted petitioner to introduce hearsay evidence against himself.

Clearly, this incident did not violate petitioner's confrontation rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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